STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2006
v	No. 258146 Ionia Circuit Court
THOMAS FRED CANIFF, Defendant-Appellant.	LC No. 04-012640-FH

Before: Murphy, P.J., and White and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of delivery of less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv). The trial court, applying a third-offense habitual offender enhancement under MCL 769.11, sentenced him to 34 months' to 40 years' imprisonment. We affirm in part, reverse in part, and remand this case for entry of a conviction of a lesser offense and for resentencing as set forth in this opinion.

Defendant argues that the prosecutor violated his constitutional right to due process by introducing evidence that defendant had a previous criminal record. Because defendant failed to preserve this issue for appellate review, this Court reviews this question for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if a clear or obvious error affected the outcome of the case and also resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

There were five instances during defendant's trial when testimony was introduced indicating that defendant had a previous criminal record. During direct examination of the confidential informant the following exchanges took place:

Q. [A]re you familiar with [defendant]?

A. Yes.

Q. How do you know [defendant]?

A. I met him in jail and I've known him for about five, six years.

* * *

Q. All right and then what happened?

A. I turned --- he turned it on and then I walked up to his house and knocked on his door.

Q. [Defendant's]?

A. Yes.

Q. Ok. How did you know that [defendant] was living there?

A. Friends of mine were in jail and said he got out and was there.

* * *

Q. Then what happened?

A. We had talked about old stuff. About us hanging out and then I got to the point of buying drugs off him.

Q. How did that happen? What happened before getting to that point?

A. Just talked about old times and got reacquainted.

Q. Well, had you not seen him in awhile?

A. Yeah, he went to jail or prison ---

Q. Let me stop you there. How long had it been since you'd seen him?

A. At least over a year.

Also, during direct examination of police detective Jonathan McNinch the following exchange took place:

Q. All right. Tell the jury what you heard as the [confidential informant] entered the residence.

A. I heard the confidential informant make contact with [defendant]. At the beginning of the conversation the confidential informant specifically said [defendant], do you remember me and then they struck up [a] small conversation about the purchase. There was a lot of conversation about what narcotics [defendant] would do while in prison other than Oxycotin's [sic] and at that point [defendant] said that he had to leave to go next door.

Finally, during cross-examination of Detective McNinch by defense counsel the following exchange took place:

> Q. Ok. You'd also stated that you've known [defendant] for how long?
>
> A. I would say approximately fifteen years.
>
> Q. Ok. When was the last time you talked with [defendant] prior to October 16th, 2003?
>
> A. I'd say prior to him going to prison.

Defendant asserts that the prosecutor violated his due process rights by introducing the above evidence because it was irrelevant and more prejudicial than probative. As a general rule, evidence of criminal acts for which a defendant is not on trial is inadmissible on the question of a defendant's guilt or innocence of the charged offense. *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). Generally, such evidence may only be introduced under MRE 404(b) or under the res gestae exception. *People v Key*, 121 Mich App 168, 179-180; 328 NW2d 609 (1982); *People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982). However, evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence and admissible under MRE 401 without regard to MRE 404(b). Thus, Michigan courts have held that evidence that is directly relevant to identifying the defendant as the person who committed the charged crime and that does not involve an intermediate inference of character does not implicate MRE 404(b). *People v Hall*, 433 Mich 573, 582-584; 447 NW2d 580 (1989); *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005).

In the present case, both the first and second references to defendant's criminal past were directly relevant to identifying defendant as the person who committed the charged crime. In the first instance, the confidential informant explained how he knew defendant. In the second, the informant explained how he knew that this was defendant's home. In both cases, this evidence was directly relevant to showing that the informant had reason to be able to identify defendant as the person who sold him the drugs in question. Accordingly, pursuant to *Hall* and *Houston,* this evidence was admissible and did not implicate MRE 404(b).

With regard to the res gestae exception, our Supreme Court has stated:

> It is elementary that the acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the res gestae. Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime. [*People v Savage*, 225 Mich 84, 86; 195 NW 669 (1923).]

In the present case, the fourth reference to defendant's criminal record occurred as Detective McNinch was describing the conversation he overheard as he listened to the transaction occur for which defendant was on trial. This clearly falls under the res gestae exception. Accordingly, this evidence was admissible.

The third reference to defendant's criminal history, i.e., the informant's referring to defendant going to jail or prison when asked if he had not seen defendant in a while, does not appear to be admissible on any of the above-mentioned bases. However, we note that this reference was given in an unresponsive, volunteered answer to a proper question. Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for a mistrial unless the prosecutor knows in advance that the witness will give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no evidence, in this instance, to indicate that the prosecutor knew in advance that the informant would give that response or that he conspired with or encouraged the informant to give that testimony. In fact, to the contrary, the prosecutor immediately stopped the informant when he began to give the improper testimony and redirected him. Therefore, defendant is not entitled to reversal.

The fifth reference to defendant's criminal record was made in response to a question asked on cross-examination by defendant's own counsel. Accordingly, this reference cannot form the basis for reversal on grounds of prosecutorial misconduct.

Moreover, we note that the trial court gave a cautionary instruction at the end of the trial advising the jury that it was not to consider defendant's criminal record as evidence of his guilt. This instruction cured any error that the prosecutor may have made in introducing the evidence challenged here. Additionally, the evidence against defendant was substantial. Accordingly, defendant has not demonstrated that the alleged errors affected his substantial rights. *Knox, supra* at 508.

Defendant next argues that the prosecutor engaged in misconduct and violated defendant's constitutional right to a fair trial when he cross-examined defendant's girlfriend regarding the death of her son and regarding whether she was pregnant.

Generally, a claim of prosecutorial misconduct is reviewed de novo, but any factual findings of the trial court are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Defendant did not object to the question regarding the pregnancy, however, so that claim is reviewed under the plain error standard. *Knox, supra* at 508.

During cross-examination of defendant's girlfriend, Sonja Lee, the following exchanges took place:

Q. Is it really true that you're shocked that your son is deceased?

A. Yes. Very much.

* * *

Q. Didn't he die of a drug over dose [sic]?

A. No, no.

* * *

Q. All right. Ma'am I have one final question from you. Are you pregnant currently?

A. No, why?

Q. You're not?

A. No, why?

Defendant asserts that these questions were improper and that, by engaging in such misconduct, the prosecutor violated defendant's constitutional right to a fair trial. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

In the present case, during direct examination of Lee, defense counsel elicited testimony that her son had recently died, that she was still in shock over his death, and that one of the reasons she was testifying on defendant's behalf was because of her son's death. Seen in this context, the prosecutor's questions regarding Lee's son's death were in direct response to an issue raised by defendant. Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). In determining whether an invited response merits reversal, a court should consider the conduct that prompted the prosecutorial response and the proportionality of that response. *Id*. In light of Lee's assertions regarding the affect of her son's death on her decision to testify on defendant's behalf, we conclude that the prosecutor's questions regarding his death were proper and proportional to the conduct that prompted the questions.

With regard to the prosecutor's questions regarding whether Lee was pregnant, this evidence was directly relevant to the issue of Lee's potential bias in testifying on defendant's behalf. If she was pregnant with defendant's child, she might be more likely to be willing to lie on his behalf. The credibility of witnesses is a material issue, and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, modified 450 Mich 1212 (1995). Accordingly, the prosecutor did not commit plain error when he questioned Lee regarding whether she was pregnant.

Next, defendant argues that the prosecutor failed to introduce sufficient evidence for a rational trier of fact to conclude that defendant delivered a Schedule 1 or 2 substance. See 333.7401(2)(a).

In reviewing a challenge to the sufficiency of the evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences therefrom may constitute

sufficient evidence to prove all elements of an offense beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant was convicted of delivering less than fifty grams of a mixture containing hydrocodone, in violation of MCL 333.7401(2)(a)(iv). A conviction under this statute requires that the drug be classified as a Schedule 1 or 2 drug. MCL 333.7401(2)(a). The prosecution acknowledges on appeal that it submitted insufficient evidence of this element and that the substance that defendant was charged with delivering was actually a Schedule 3 substance. Indeed, the parties stipulated that the substance at issue was hydrocodone, and a laboratory report admitted into evidence stated that the substance contained dihydrocodeinone[1] that, in that preparation, was a Schedule 3 substance. See, generally, MCL 333.7216(1)(g). Accordingly, there was insufficient evidence to support defendant's conviction of violating MCL 333.7401(2)(a)(iv) because, by the plain language of the statute, a necessary element of that crime is that the relevant drug be a Schedule 1 or 2 drug. The only matter remaining in dispute with regard to this issue is the appropriate remedy.

Defendant asserts that he is entitled to the reversal of his conviction and dismissal of the charge based on the prosecutor's failure to produce sufficient evidence to support defendant's conviction. Plaintiff asserts that the case should merely be remanded for correction of the information and the judgment of sentence to reflect a conviction of delivering a Schedule 3 substance in violation of MCL 333.7401(2)(b)(ii), without disturbing defendant's minimum prison sentence. While the prosecution is correct that remanding for entry of a conviction of violating MCL 333.7401(2)(b)(ii) is appropriate, we conclude that defendant is entitled to resentencing.

It is manifest that, under the circumstances of this case, the jury's verdict convicting defendant of violating MCL 333.7401(2)(a)(iv) necessarily encompassed factual findings of the essential elements of the lesser crime of violating MCL 333.7401(2)(b)(ii). Accordingly, it is appropriate for us to remand this case for entry of a conviction of the lesser offense, which was not affected by any error with regard to the greater offense. See *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001). There was sufficient evidence in this case to support a conviction of the lesser offense of violating MCL 333.7401(2)(b)(ii) and it is unequivocally clear that the jury found every element necessary to support a conviction of that lesser offense. Thus, under the analysis in *Bearss*, it is appropriate to remand this case to the trial court for entry of a conviction of the lesser crime of a violation of MCL 333.7401(2)(b)(ii).

When an appellate court vacates a conviction of a greater offense because it is not supported by sufficient evidence and remands for entry of a conviction of a lesser offense, resentencing is appropriate. See, e.g., *People v Randolph*, 466 Mich 532, 553; 648 NW2d 164 (2002). However, the prosecutor argues that it is unnecessary to remand for resentencing in this case and that this Court may simply order a reduction in defendant's maximum sentence. The prosecutor indicates that the scoring of the guidelines for the lesser offense would actually result

[1] Hydrocodone and dihydrocodeinone are different names for the same drug.

in a *higher* sentencing guidelines range because of an anomaly in the sentencing guidelines. (Specifically, the prosecutor asserts that, rather than a 5-to-34 month range, the guidelines range would be 7 to 34 months.) Further, it is admittedly true that the trial court sentenced defendant to a 34-month minimum sentence, which is at the highest point of either guidelines range. However, even assuming for purposes of discussion that the prosecutor's position regarding the scoring of the guidelines is accurate, the fact remains that the provision defendant was wrongly convicted of violating, MCL 333.7401(2)(a)(iv), generally carries a maximum sentence of twenty years,[2] while a conviction of the lesser offense that will be entered on remand generally carries a seven-year maximum sentence, MCL 333.7401(2)(b)(ii). Thus, in this case, the lesser offense, while still a serious crime, is classified as a much less serious crime than the greater crime. Accordingly, this Court cannot be confident that the trial court would have imposed the same minimum sentence if it had sentenced defendant for the appropriate lesser offense. Thus, we conclude that defendant must be resentenced in connection with the entry of a conviction of the lesser offense.

Next, defendant argues that the trial court gave the jury incorrect instructions with regard to the elements of the crime. Defendant has waived appellate review of this issue because he acceded to the jury instructions below, despite being offered the opportunity to request the allegedly improperly omitted instruction before the jury began its deliberations. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel. A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial such that that there is a reasonable probability that, but for counsel's unprofessional error or errors, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first asserts that trial counsel was ineffective when he failed to object to or move to strike references to defendant's criminal record. This argument is without merit.

As discussed earlier, most of the challenged references to defendant's criminal history were admissible, either as substantive evidence or under the res gestae exception. Further, as also noted earlier, to the extent that the references were not admissible for either of these reasons, they were nonetheless not grounds for reversal. Defendant has simply failed to demonstrate that

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[2] The trial court imposed a higher maximum sentence on defendant as an habitual offender.

there is a reasonable probability that any error that may have been made in connection with the references to his criminal record affected the outcome of the trial.

Defendant next asserts that trial counsel was ineffective in failing to object when the prosecution questioned defendant's girlfriend, Sonja Lee, regarding her son's death and regarding whether she was pregnant. Again, this argument is without merit. First, trial counsel did in fact object to the questioning regarding Lee's son's death. Moreover, as discussed above, the questioning regarding whether Lee was pregnant was proper. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also asserts that trial counsel was ineffective (1) in failing to object to the trial court's instruction regarding the elements of the charged crime, because the instruction the court gave failed to require the jury to find that the substance in question was a Schedule 2 substance rather than a Schedule 3 substance; and (2) in failing to object to the information or move for a directed verdict based on the lack of evidence of a Schedule 2 substance. This argument has merit.

Defendant was charged with delivering less than fifty grams of a Schedule 2 substance. However, the only evidence introduced at trial on the question indicated that the substance in question was actually a Schedule 3 substance. Accordingly, trial counsel's performance in failing to recognize this fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, *supra* at 689. Moreover, it is a practical certainty that, but for counsel's error, the results of the proceedings would have been different. *Toma*, *supra* at 302-303. Had trial counsel objected to the charge, the information would have been amended to charge defendant with a lesser offense, and defendant would not have been tried on the higher charge, much less convicted of it. Accordingly, trial counsel was ineffective in failing to object to the charge. For the same reasons, trial counsel was also ineffective in failing to move for a directed verdict.

When ineffective assistance of counsel is established, the remedy must be tailored to the injury suffered. *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). In the present case, the proper remedy is to remand this case to the trial court for entry of a conviction of delivering dihydrocodeinone in violation of MCL 333.7401(2)(b)(ii) and for resentencing.

Affirmed in part, reversed in part, and remanded for entry of a conviction of the lesser offense and for resentencing as set forth in this opinion.

/s/ William B. Murphy
/s/ Patrick M. Meter